Assan bin Mohamad & Ors v Hock Huat Chan Sdn Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-01–62 OF 2008
ABU SAMAH, MOHD HISHAMUDIN AND AZIAH ALI JJCA
22 APRIL 2013

B

Customs and Excise — Forfeiture — False declaration — Whether importer of goods seized for offence of false declaration had opportunity to claim for goods within one month of seizure — Whether seized goods deemed forfeited if no claim for them made within one month of seizure — Whether provisions in Customs Act 1967 fair and reasonable — Customs Act 1967 s 128(1)(a) & (2)

C

D

The Customs Department of Kuching, Sarawak, seized 21 containers of rice ('the goods') imported by the respondent at the Kuching Port on the ground the goods were falsely declared to be broken rice. The goods were in fact normal rice. The respondent had a licence to import the former but not the latter. Although the customs department considered that an offence of false declaration of imported goods had been committed under the Customs Act 1967 ('the Act') it did not carry out any prosecution. Section 128 of the Act provided that the seized goods would be deemed forfeited at the expiration of one month from the date of the seizures unless before such expiration, inter alia, a claim to the goods was made by any person asserting that he was their owner and that they were not liable to forfeiture. The respondent did not make any claim to the seized goods and the customs department sold them to BERNAS. The respondent subsequently sued the appellants in the High Court for damages for unlawful seizure of the goods complaining that it was not given an opportunity to be heard before the seizures were carried out. Although the respondent's pleaded case was against the alleged unlawfulness of the seizures and not against the legality of the forfeitures, the trial court held the seizures to be valid but that the forfeiture of the goods was unlawful. The trial judge ordered the respondent's claim of 'ownership' over the goods to be referred to a magistrate for determination under s 128(4) of the Act. The trial court held that as ordinary citizens could not be expected to know of their rights under s 128 of the Act, and given art 13 of the Federal Constitution, the rules of natural justice, the customs department had an implicit legal duty under s 114 of the Act to have notified the respondent that the goods were liable to be forfeited under s 128 of the Act unless a claim for their return was made within a month of the date of the seizures.

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Held, allowing the appeal with costs:

(1) There was no contravention of the Customs Act by the officers of the

customs department with regard to the forfeiture of the goods. The respondent did not make any claim to the seized goods within the one-month period stipulated under s 128(1)(a) and (2) of the Act. In such a situation, the Act provided that the seized goods 'shall be taken and deemed to be forfeited at the expiration of one calendar month' from the date of seizure of the goods. There was nothing else for the customs department to do except to treat the goods as forfeited goods and to deal with them accordingly (see paras 17 & 18).

(2) On the facts of the instant case and considering the provisions of the Customs Act it was not legitimate to interpret s 114 of the Act in the manner adopted by the trial judge. There was no unfairness in the provisions of the Act; nor were they contrary to the rules of natural justice. The statutory scheme in place in the Act was fair and reasonable. Sections 114 and 128 of the Act gave the owner of the seized goods the opportunity to make a claim within one month of seizure if there was no prosecution. The respondent was aware of the seizures but it did not serve any notice on the customs department pursuant to s 128 to claim the seized goods. The respondent had only itself to blame for failing to exercise its rights under s 128 (see para 26).

(3) The respondent's complaint was against the legality of the seizures of the goods and not against the legality of the forfeitures. The trial judge should have confined his decision to the respondent's pleading and the issues raised by the parties before him; all the more so when the judge himself acknowledged that the issue about art 13 and the legality of the forfeitures were neither pleaded nor raised by the parties before him but was raised by him on his own volition (see para 29).

(4) There was no merit in the trial judge's view that ordinary citizens must be informed of their rights when it involved an exercise of public power resulting in deprivation of property and that it was unreasonable to assume ordinary citizens knew the law. Our legal system operated on the principle that members of the public must be deemed to know the law. Without that principle there would be chaos in the administration of justice (see paras 27 & 28).

[Bahasa Malaysia summary

Jabatan Kastam Kuching, Sarawak telah merampas 21 kontena beras ('barangan tersebut') yang diimport oleh responden di Pelabuhan Kuching atas alasan bahawa barangan tersebut telah diisytiharkan sebagai beras hancur. Barangan tersebut sebenarnya beras biasa. Responden mempunyai lesen untuk mengimport beras hancur tetapi tidak beras biasa. Walaupun jabatan kastam menganggap bahawa suatu kesalahan pengisytiharan palsu barangan import telah dilakukan di bawah Akta Kastam 1967 ('Akta'), ia tidak membuat apa-apa pendakwaan. Seksyen 128 Akta memperuntukkan bahawa barangan

yang dirampas tersebut dianggap telah dirampas selepas tarikh tamat satu bulan daripada tarikh rampasan melainkan sekiranya sebelum tarikh tamat, antara lain, satu tuntutan terhadap barangan tersebut dibuat oleh seseorang yang mendakwa dirinya pemilik dan mereka tidak bertanggungan bagi perampasan. Responden tidak membuat apa-apa tuntutan ke atas barangan yang dirampas dan jabatan kastam menjualnya kepada BERNAS. Responden seterusnya mengambil tindakan terhadap perayu-perayu di Mahkamah Tinggi bagi ganti rugi terhadap rampasan barangan tersebut secara tidak sah, dengan menghujahkan bahawa ia tidak diberi peluang didengar sebelum rampasan dijalankan. Walaupun kes yang diplidkan oleh responden adalah terhadap dakwaan ketaksahan penyitaan dan bukan terhadap kesahan perampasan, mahkamah bicara memutuskan bahawa penyitaan adalah sah dan perampasan barangan tersebut adalah tidak sah. Hakim bicara memerintahkan agar tuntutan 'milikan' oleh responden terhadap barangan tersebut dirujuk kepada majistret bagi pemutusan di bawah s 128(4) Akta. Hakim bicara memutuskan bahawa rakyat biasa tidak boleh dijangka untuk mengetahui hak-hak mereka di bawah s 128 Akta dan berdasarkan perkara 13 Perlembagaan Persekutuan, kaedah-kaedah keadilan asasi, jabatan kastam mempunyai kewajipan tersirat di sisi undang-undang di bawah s 114 Akta untuk memaklumkan kepada responden bahawa barangan tersebut boleh dirampas di bawah s 128 Akta melainkan tuntutan pemulangannya dibuat dalam masa sebulan dari tarikh rampasan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tidak terdapat percanggahan Akta Kastam oleh pegawai-pegawai jabatan kastam bagi perampasan barangan tersebut. Responden tidak membuat apa-apa tuntutan ke atas barang yang dirampas dalam masa satu bulan, iaitu tempoh masa yang diperuntukkan di bawah s 128(1)(a) dan (2) Akta. Dalam keadaan sedemikian, Akta memperuntukkan bahawa barangan tersebut 'akan diambil dan dianggap sebagai telah dirampas dengan tamatnya kalendar satu bulan' dari tarikh rampasan barangan tersebut. Tiada apa lagi yang boleh dilakukan oleh jabatan kastam melainkan menganggap barang tersebut sebagai barangan yang dirampas dan menguruskannya dengan sewajarnya (lihat perenggan 17 & 18).

(2) Berdasarkan fakta-fakta dalam kes ini dan peruntukan-peruntukan dalam Akta Kastam, adalah tidak sah untuk mentafsir s 114 Akta dalam cara yang digunapakai oleh hakim bicara. Tidak terdapat ketidakadilan dalam peruntukan Akta; tidak terdapat juga percanggahan dengan kaedah-kaedah keadilan asasi. Skima statutori yang terdapat dalam Akta adalah adil dan munasabah. Seksyen-seksyen 114 dan 128 Akta memberikan pemilik yang barangannya dirampas, suatu peluang untuk membuat tuntutan dalam masa satu bulan dari rampasan sekiranya tiada pendakwaan. Responden sedar akan rampasan tersebut tetapi tidak menyampaikan sebarang notis kepada jabatan kastam di bawah s 128

untuk menuntut barangan yang dirampas. Responden hanya boleh menyalahkan dirinya sendiri kerana gagal untuk menjalankan haknya di bawah s 128 (lihat perenggan 26).

(3) Aduan responden adalah terhadap kesahan penyitaan barangan tersebut dan bukan terhadap kesahan perampasan. Hakim bicara sewajarnya mengehadkan keputusannya kepada pliding responden dan isu-isu yang dibangkitkan oleh pihak-pihak di hadapannya; khasnya apabila hakim sendiri mengiktiraf isu perkara 13 dan kesahan perampasan-perampasan tidak diplidkan mahupun dibangkitkan oleh pihak-pihak di hadapan beliau tetapi telah dibangkitkan oleh beliau sendiri berdasarkan kerelaannya sendiri (lihat perenggan 29).

(4) Tiada merit dalam pandangan hakim bahawa rakyat biasa mestilah dimaklumkan mengenai hak-hak mereka apabila melibatkan penggunaan kuasa awam yang menyebabkan penafian terhadap harta dan bahawa adalah munasabah untuk menganggap rakyat biasa tahu akan undang-undang. Sistem perundangan kita beroperasi atas prinsip bahawa ahli-ahli awam mestilah dianggap mengetahui undang-undang. Tanpa prinsip tersebut, akan terdapat kacau ganggu dalam pentadbiran keadilan (lihat perenggan 27 & 28).]

Notes

For a case on false declaration, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) para 83.

Cases referred to

Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)

S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors [1982] 1 MLJ 204, FC (refd)

Legislation referred to

Customs Act 1967 ss 114, 114(3), 128, 128(1), (1)(a), (2), (4), 133(1)(a), 135(1)(a)

Federal Constitution art 13, 13(1)

Nik Suhaimi Nik Sulaiman (Senior Federal Counsel, Attorney General's Office) for the appellants.

Baru Bian (The Law Office of Baru Bian) for the respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellants against the decision of the High Court

of Kuching of 7 March 2008 given in favour of the respondent.

THE ORDER OF THE HIGH COURT THAT IS BEING APPEALED

[2] On 7 March 2008, the learned judge of the High Court of Kuching, at the conclusion of the trial of the respondent's (the plaintiff at the High Court) writ action against the appellants (the defendants at the High Court), ordered that the respondent's claim of 'ownership' over certain goods seized and forfeited by the customs department of Kuching be referred to a magistrate's court pursuant to s 128(4) of the Customs Act 1967.

THE DECISION OF THIS COURT

[3] On 18 October 2011, by a unanimous decision, we allowed the appellants' appeal with costs.

[4] We now give our grounds.

THE FACTS OF THE CASE

[5] The first appellant is an enforcement officer attached to the Department of Customs, Kuching.

[6] The officers of the customs department of Kuching had seized goods (21 containers containing rice) belonging to the respondent on four occasions, namely, on 20 November 2001 (the first seizure), on 27 March 2002 (the second seizure), on 2 April 2002 (the third seizure), and 15 May 2002 (the fourth seizure). The seizures took place at the Kuching Port. The reason for the seizures is that the respondent, in importing the goods, had falsely declared that it was importing *temukut* (broken rice) for which it had a licence; when in actual fact it was importing normal rice for which it had no licence. From the standpoint of the customs department, the respondent had committed an offence under s 133(1)(a) of the Customs Act 1967 (the offence of false declaration in respect of goods to be imported) of the Customs Act 1967 and punishable under s 135(1)(a) of the same Act.

[7] For the first seizure, a notice of seizure was issued to the agent of the respondent, namely, one Mr Chua Hong Kim, as required by s 114(3) of the Customs Act. For the second, third and fourth seizures, no notice of seizure was issued as the seizures were done in the presence of the said Mr Chua, an agent of the respondent, and as such the requirement as to notice is exempted by the proviso to sub-s (3) of s 114.

[8] Section 114(3) of the Customs Act provides:

> Seizure of goods the subject of an offence
>
> (1) All goods in respect of which there has been, or there is, reasonable cause to suspect that there has been committed any offence against this Act or any regulation made thereunder, or any breach of any of the provisions of this Act or of any regulation made thereunder or of any restriction or condition subject to or upon which any licence or permit has been granted, together with any receptacle, package, conveyance, vessel not exceeding two hundred tons nett registered tonnage, or aircraft other than an aircraft engaged in international carriage, in which the same may have been found or which has been used in connection with such offence or breach, and any books or documents which may reasonably be believed to have a bearing on the case, may be seized by any officer of customs in any place either on land or in territorial waters.
>
> (2) All such goods and such receptacles, packages, conveyances, vessels or aircraft shall, as soon as conveniently may be, be delivered into the care of a proper officer of customs whose duty it is to receive the same.
>
> (3) Whenever any goods, conveyances, vessels or aircraft are seized under this Act, the seizing officer shall forthwith give notice in writing of such seizure and the grounds thereof to the owner of such goods, if known, either by delivering such notice to him personally or by post at his place of abode, if known:
>
> Provided that such notice shall not be required to be given where such seizure is made on the person, or in the presence of the offender or the owner or his agent, or in the case of a vessel or an aircraft, in the presence of the master or pilot, as the case may be.

[9] In the present case, there were no prosecutions carried out with regard to the goods seized.

[10] Now, s 128 of the Customs Act provides as to what will happen to the seized goods when there is no prosecution:

> Goods seized or in respect of which there is no prosecution, or the proceeds of sale thereof, are forfeited if not claimed within one month
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> 128
>
> (1) If there be no prosecution with regard to any goods seized under this Act, such goods or the proceeds of sale of such goods which are held pursuant to paragraph 115(1)(c) shall be taken and deemed to be forfeited at the expiration of one calendar month from the date of seizure of the goods unless, before such expiration —
>
> (a) a claim to such goods or the proceeds of sale of such goods is made under subsection (2);

(b) a written application is made for the return of such goods under paragraph 115(1)(a) or (b); or

(c) such goods are returned under the said paragraph (a) or (b).

(2) Any person asserting that he is the owner of such goods or the proceeds of sale of such goods, as the case may be, and that they are not liable to forfeiture may give written notice to a senior officer of customs that he claims the same.

(3) On the expiration of the period mentioned in subsection (1), or, if a decision is made earlier that there be no prosecution with regard to the goods, on the making of the decision the senior officer of customs shall, if such goods or the proceeds of sale of such goods are not taken and deemed to be forfeited under that subsection, refer the claim to the Director General who may direct that such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be, be released, or may direct such senior officer of customs, by information in the prescribed form, to refer the matter to a Magistrate of the First Class for his decision.

(4) The Magistrate of the First Class shall issue a summons requiring the person asserting that he is the owner of the goods or the proceeds of sale of such goods, and the person from whom the goods were seized, to appear before him, and upon their appearance or default to appear, due service of such summons being proved, the Magistrate of the First Class shall proceed to the examination of the matter, and upon proof that an offence against this Act or any regulations made thereunder has been committed and that such goods were the subject matter, or were used in the commission, of such offence, shall order such goods or the proceeds of sale of such goods or the amount secured under paragraph 115(1)(a) or (b), as the case may be, to be forfeited, or in the absence of such proof, may order the release of such goods or the proceeds of sale of such goods or the security furnished under paragraph 115(1)(a) or (b), as the case may be.

(5) In any proceedings under subsection (4), section 119 shall apply to the person asserting that he is the owner of the goods and to the person from whom they were seized as if such owner or person had been the defendant in a prosecution under this Act.

[11] The respondent did not make any claim to the seized goods pursuant to s 128(1)–(2) of the Customs Act by giving written notice to the customs department asserting:

(a) that it was the owner of the goods;

(b) that the goods were not liable to forfeiture; and

(c) that it was claiming the same.

[12] Subsequently, the forfeited goods were sold by the customs department

to BERNAS.

THE RESPONDENT'S/PLAINTIFF'S WRIT ACTION

[13] The respondent in its writ action sued the appellants for unlawful seizure of its goods and claimed for damages. The complaint was on the grounds that the respondent was not given an opportunity to be heard before the seizures were carried out.

THE DECISION OF THE HIGH COURT

[14] The learned High Court judge, at the conclusion of the trial, however, found the seizures to be lawful. In his grounds of judgment, the learned judge rules:

> Accordingly I find that the seizure was legally carried.

[15] There is no cross-appeal by the respondent against this significant finding by the learned High Court judge. Hence, the legality of the seizures is not in issue in this appeal.

[16] However, the learned High Court judge, having ruled the seizures to be lawful, nevertheless, goes on to hold that the forfeitures of the seized goods to be unlawful; and having held that the forfeitures were unlawful ordered that the respondent's claim of 'ownership over the goods' be referred to a magistrate's court pursuant to s 128(4) of the Customs Act 1967.

THE GROUNDS FOR OUR DECISION

[17] In our judgment, the appeal must be allowed. With respect, we disagree with the views of the learned High Court judge on the issue of forfeitures. We do not see any contravention of the Customs Act by the officers of the customs department with regard to the forfeitures of the goods.

[18] In the present case, it is not disputed that the owner of the goods, that is to say, the respondent did not make any claim to the seized goods within the prescribed one-month period, the period as stipulated by s 128(1)(a) and (2) of the Customs Act. In such a situation, the Customs Act provides for automatic forfeitures. The Customs Act provides that the seized goods 'shall be taken and deemed to be forfeited at the expiration of one calendar month'. There is nothing else for the customs department to do except to treat the goods as forfeited goods, and to deal with them accordingly.

[19] In ruling that the forfeitures were unlawful, the learned High Court judge takes the view that the customs department was under a legal duty to notify the owner of the goods (and in the present case, the respondent) that the goods would be liable to forfeiture under s 128 of the Customs Act if there were no prosecution made in respect of the seized goods, unless a claim is made within one month from the date of the seizure by the owner of the goods for the return of the goods to him/it. The learned trial judge is, however, aware that there is no express provision in the Customs Act imposing such a duty on the customs department. Be that as it may, the learned trial judge is of the opinion that such a duty is, nevertheless, implicit in s 114 of the Customs Act by reason of art 13 of the Federal Constitution and the principles of natural justice, citing the following passage in the judgment of Lord Diplock in the Privy Council case of *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 (an appeal to the Privy Council from the Court of Criminal Appeal, Singapore) (at p 71):

> In a constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such context as 'in accordance with law,' 'equality before the law,' 'protection of the law' and the like, in Their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.

[20] The learned High Court judge also refers to the Federal Court case of *S Kulasingam & Anor v Commissioner of Lands, Federal Territory & Ors* [1982] 1 MLJ 204. In this case cited, at the High Court stage, Hashim Yeop A Sani J (as he then was) approved Lord Diplock's dictum in *Ong Ah Chuan* by saying:

> In my view the proper interpretation of the word 'law' is not as in Comptroller-General of *Inland Revenue v NP* [1973] 1 MLJ 165 which is, with respect, too restrictive, but as interpreted in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64, at p 71 in the judgment of the Privy Council dealing with the very same words 'in accordance with the law' appearing in a provision of the Singapore Constitution …

[21] The dictum of Lord Diplock in *Ong Ah Chuan* was cited with approval when the case of *S Kulasingam v Commissioner of Lands* subsequently went on appeal to the Federal Court. Abdoolcader J (as he then was) in delivering the

judgment of the Federal Court (the other two judges on the panel being Syed Othman FJ and Mohamed Azmi J (as he then was)) said (at p 211):

> We therefore have to consider the connotation of the term 'law' in art 13(1) which stipulates that no person shall be deprived of property save in accordance with law. Lord Diplock in delivering the judgment of the Privy Council in *Ong Ah Chuan v Public Prosecutor* said … 'law' in such context refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution, referring to that of Singapore but this equally applies to such written constitutions including ours.

[22] Now, art 13, cl (1) of the Federal Constitution provides:

> (1) No person shall be deprived of property save in accordance with the law.

[23] Having referred to art 13 of the Federal Constitution and the cases of *Ong Ah Chuan* and *S Kulasingam v Commissioner of Lands*, the learned High Court judge in the present case then goes on to rule:

> So adopting that approach, I hold that there must be read into s 114 of the Customs Act a requirement on the part of the second defendant or his servants or agents to attach with the notice of seizure a written notice of forfeiture explaining or warning in plain language to the owners of the goods seized that if there is no prosecution in respect of the goods seized, they will be forfeited if there is no written claim for ownership given to the director of Customs, Sarawak, within one calendar month from the date of seizure.

[24] And, in conclusion, the learned judge rules:

> For all the reasons given above, I find that the seized goods were not properly forfeited and pursuant to prayer (vii) of the statement of claim, I order the plaintiff's claim of ownership of the seized goods be adjudicated before the magistrate court as provided for in s 128(4) of the Customs Act.

[25] The above passage from the judgment of Lord Diplock in the Privy Council case of *Ong Ah Chuan* (as quoted by the learned High Court judge) is illuminating and is a valuable contribution to the development of our constitutional law. It serves as a salutary reminder to judges who have a tendency of adopting a restrictive or literal approach when interpreting the Constitution.

[26] However, be that as it may, with respect, we are unable to agree with the reasoning and ruling of the learned High Court judge in the context of the present case. In our judgment, on the facts of the instant case and considering

the provisions of the Customs Act, it is not legitimate to interpret s 114 of the Customs Act in the manner as adopted by the learned trial judge. In our view, there is no unfairness in the statutory provisions of the Customs Act; nor are the statutory provisions contrary to the rules of natural justice. There is thus no justification to resort to reliance on the passage (that we have just quoted) of Lord Diplock's judgment in *Ong Ah Chuan*. The statutory scheme in place in the Customs Act is fair and reasonable. Sections 114 and 128 of the Customs Act give the owner of the seized goods the opportunity to make a claim within one month of the seizure — if there is no prosecution. The respondent was aware of the seizures. But it did not serve any notice on the customs department pursuant to s 128 of the Customs Act to claim those seized goods. If it failed to exercise its rights accorded to it by s 128 of the Customs Act to claim those goods, then it had only itself to be blamed.

[27] The learned trial judge takes the view that the giving of the 'forfeiture notice' (in the manner that he suggests) is mandatory as it is not reasonable to expect the respondent, being an ordinary citizen, to know of its right under s 128 of the Customs Act. In the words of the learned judge:

> Ordinary citizens of the country must be informed of their rights when it involved an exercise of public power resulting in deprivation of property. As stated earlier, it is unreasonable to assume ordinary citizens of the country to know the law.

[28] With respect, we find no merit in such a view. Our legal system operates on the principle that the members of the public must be deemed to know the law. If we were to do away with this principle, there will be chaos in the administration of justice.

[29] In any event, the complaint of the respondent in the present case is against the legality of the seizures of the goods, as carried out by the customs department. The complaint of the respondent in its statement of claim is not against the legality of the forfeitures. The learned trial judge should have confined his decision based on the respondent's pleading and the issues raised by the parties before him; all the more so when the learned trial judge himself acknowledged in his grounds of judgment that the issue about art 13 and the legality of the forfeitures (as opposed to the legality of the seizures) is neither pleaded nor raised by the parties before him, but is raised by him on his own volition.

[30] Appeal allowed with costs.

Appeal allowed with costs.

Reported by Ashok Kumar